In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 412

SALVATORE SHILLITANI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

On August 10, 1964, in the Southern District of New York, in a proceeding under Rule 42(b), F.R. Crim. P., petitioner was found guilty of contempt for willfully disobeying an order to answer certain questions before the grand jury after having been granted immunity from prosecution. He was sentenced to imprisonment for two years with the proviso that if he should answer the questions prior to the discharge of the grand jury, a further order "may be made ter-

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minating the sentence" (1 R. 21–22). On May 18, 1965, the court of appeals affirmed (345 F. 2d 290).[1]

In February, April and May 1964, petitioner had appeared before the grand jury under subpoena and had refused to answer questions on the ground that the answers would incriminate him (2 R. 2–4, 8, 11–13, 14–18). On July 1, 1964, the government applied to Judge Wyatt for an order directing petitioner to testify before the grand jury under the immunity provisions of 18 U.S.C. 1406 (1 R. 3–6, 2 R. 66–70). Judge Wyatt instructed petitioner that he was being granted "full and absolute immunity" and that a failure to answer the questions would subject him to contempt proceedings (1 R. 6). The court read to petitioner the questions which it ordered him to answer (1 R. 14–19). On July 2 and again on August 4,

[1] On June 4, 1965, on motion of petitioner, the court of appeals stayed its mandate and continued petitioner's bail pending a determination of a petition for a writ of certiorari. On June 25, 1965, petitioner asked this Court for an extension of time until August 3, 1965 to file such a petition. He said: "As the last action taken by said court (the court of appeals) was June 4, 1965, the time within which a petition for a writ of certiorari may be filed expires on July 4, 1965". Acting on this motion, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including August 3, 1965, and the petition was filed on July 31, 1965. Since the order of the court of appeals staying the mandate does not extend the time for filing a petition for certiorari, petitioner's application to this Court for an extension of time was untimely under Rule 34–2 of the Rules of this Court, and his petition is out-of-time under Rule 22–2. However, since the central question presented here involves the legality of a sentence—an issue which may be corrected at any time—this Court may dispense with the limitations of its rules. See *Heflin* v. *United States*, 358 U.S. 415, 418, note 7.

1964, petitioner reappeared before the grand jury and refused to answer the questions (2 R. 19–26, 27–33).

On August 10, 1964, upon oral notice and upon an order to show cause, petitioner was brought before Judge MacMahon on a charge that he was in contempt of court (2 R. 39–42, 44, 56; 1 R. 1). A hearing was held before Judge MacMahon. No request for a jury trial was made. After requesting dismissal on the ground that the government had failed to prove a *prima facie* case, petitioner rested (2 R. 54–55).

The court found petitioner guilty of criminal contempt for his willful disobedience of the court order during his appearances before the grand jury on July 2, 1964, and August 4, 1964 (2 R. 56–59). The court sentenced petitioner to imprisonment for two years "or until further order of this Court, should [petitioner] answer before the grand jury the questions * * * and should [petitioner] answer those questions before the expiration of said sentence or the discharge of said grand jury, whichever may first occur, the further order of this Court may be made terminating the sentence of imprisonment" (1 R. 21–22).[2] In affirming, the court of appeals construed this language to mean that petitioner had an unqualified right to be released if he obeyed the order of the district court.

Although petitioner does not suggest any factual issue which might have been determined by a jury

[2] The court first said (2 R. 61): "I want to make it clear that the sentence of the Court is not intended so much by way of punishment as it is intended solely to secure for the grand jury answers to the questions that have been asked of you."

nor did he request a jury trial in the district court, he now claims that his sentence—imprisonment for two years—could not properly be imposed without a jury trial. The constitutionaity of a one-year sentence is pending before the Court in *Harris* v. *United States,* No. 6, this Term, and this case may be affected by the decision in *Harris.* We agree, therefore, that it would be appropriate to defer action on this petition until the related issue in *Harris* is determined.

There is no merit to any of the other questions raised by petitioner. The judgment of conviction was not invalidated because of any ambiguity in the sentence. The sentence imposed, far from being prejudicial to petitioner's interests, gave him an opportunity to avoid or reduce his prison term if he decided to purge himself of contempt. The court merely exercised "the least possible power adequate to the end proposed." *Anderson* v. *Dunn,* 6 Wheat. 204, 231. The claim that the immunity provisions would not have protected petitioner against adverse action by the parole board is answered by the plain wording of the statute. Section 1406 of Title 18 provides that "no such witness shall be * * * subjected to *any penalty or forfeiture*" on account of his compelled testimony. As for the claim that petitioner could not have known any facts regarding the persons mentioned in the grand jury's inquiries, petitioner should have so advised the grand jury rather than asserting a privilege. To the extent that he could have testified to hearsay, the grand jury was entitled to know what he

had heard since its investigation is not limited by court-room rules of evidence.

Respectfully submitted.

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